No. 03-103

In the Supreme Court of the United States

BERMAN J. WATTS, JR., PETITIONER

v.

LES BROWNLEE, ACTING SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner can, or has, properly raised a disparate impact claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported. The pertinent opinion of the district court (Pet. App. Exs. 3-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2002. The court of appeals denied the petition for rehearing on February 18, 2003 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on May 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case stems from petitioner's unsuccessful effort to obtain a job application for a non-pilot, engineering position at Fort Rucker in Alabama.

1. Petitioner requested a job application from the Fort Rucker Personnel Office for a non-pilot, aerospace engineer position. Pet. App. 2a. Petitioner, however, was sent an application for a position requiring a pilot's license, which petitioner did not have. *Ibid.* Petitioner contended that private publications listed an engineering position that did not require a pilot's license. *Id.* at 2a-3a. The government maintained that a non-pilot position never existed, and that the publication suggesting otherwise had made an error that was promptly corrected. See *id.* at 2a-3a; Pet. App. Ex. 10, at 2.[1]

Petitioner filed a formal administrative complaint alleging that respondents had discriminated based on race and had retaliated against him for having filed previous grievances. The complaint, however, did not allege age discrimination. See Pet. Ex. 4, at 4; see also Plaintiff's Additional Amendment and Clarification of Complaint, Ex. 12 (Aug. 17, 2000) (Dist. Ct. Docket Entry No. 50) (attaching copy of formal EEO complaint). On April 16, 1999, the Fort Rucker Equal Employment Opportunity Office determined that petitioner had presented no evidence to support a claim of race discrimination or retaliation. See Pet. App. 3a. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB). The EEOC also concluded that no discrimination or retaliation had been shown,

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[1] Some of the exhibits to the petition for a writ of certiorari are not separately numbered. For the Court's convenience, we have included page numbers when citing those materials.

and the MSPB dismissed petitioner's appeal. See *id.* at 3a-4a.

Petitioner then filed a complaint in district court. In that complaint, petitioner alleged race discrimination, retaliation, and, for the first time, discrimination based on age. Petitioner, however, did not pursue the age discrimination claim in his summary judgment papers. See Memorandum in Support of Plaintiff's Response to Defendant's Motion to Dismiss or for Summary Judgment (Dec. 12, 2000) (Dist. Ct. Docket Entry No. 54); Memorandum in Support of Plaintiff's Response to Defendant's Reply on Motion to Dismiss or for Summary Judgment (Jan. 12, 2001) (Dist. Ct. Docket Entry No. 56). A magistrate judge recommended granting summary judgment for the government. Pet. App. Ex. 4. The magistrate's report addressed petitioner's race discrimination and retaliation claims under Title VII. *Ibid.* It did not, however, address any age discrimination claims. *Ibid.* Adopting the report and recommendation of the magistrate judge, the district court granted the government's motion for summary judgment. Pet. App. Ex. 3.

2. Petitioner appealed, arguing that he had been subjected to race discrimination (including disparate impact discrimination) and retaliation, Pet. C.A. Br. 17-22; that venue was improper, *id.* at 24-25; that the district court had jurisdiction over his appeal of the MSBP decision, *id.* at 33-34; and that the district court had made various other procedural errors, *id.* at 27-31, 34-38. See Pet. C.A. Reply Br. 5-7. Petitioner did not, however, claim age discrimination. Petitioner's opening brief thus did not mention age discrimination at all, and his reply brief mentioned it only once, when citing an age discrimination case to support petitioner's claim that he was entitled to discovery. *Id.* at 14.

The court of appeals affirmed. Pet. App. 1a-8a. The court of appeals first found that petitioner had not established "a prima facie case of discrimination or retaliation." Pet. App. 5a. Petitioner, the court of appeals held, had "raised no genuine issue of material fact that another equally or less qualified person outside the protected class received a non-pilot application when [petitioner] made his request." *Id.* at 4a. Further, while petitioner claimed that he never received applications for non-pilot positions once such positions became available, petitioner "never requested applications for these positions." *Ibid.* Petitioner, moreover, "proffered no evidence that a similarly situated person outside the protected class received an application without asking for one." *Ibid.*

The court of appeals also dismissed petitioner's disparate impact claim in a footnote. The court noted that, under circuit precedent, petitioner's "disparate impact claim is cognizable only under Title VII." Pet. App. 6a n.3. The court then explained that petitioner's "disparate impact claim" under Title VII "fails because [petitioner] identifies no specific practice that resulted" in African-Americans not being hired as aerospace engineers. *Ibid.*

Finally, the court of appeals concluded that petitioner's retaliation claim was properly dismissed for failure to show adverse employment action. See Pet. App. 5a. No non-pilot position existed when petitioner applied, and petitioner did not apply for such a position when one did become available. *Ibid.* Petitioner, the court of appeals further observed, had failed to show that the Fort Rucker employee who sent the application had any knowledge of petitioner's protected activities. *Ibid.*

ARGUMENT

The court of appeals' unpublished decision, which holds that petitioner's discrimination claims were factually unsupported, is correct and does not warrant further review. Although petitioner asks this Court to decide whether a disparate impact claim may be brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, this case does not properly present that question. Petitioner failed to satisfy the statutory conditions precedent to filing a lawsuit under the ADEA, and he failed properly to press an age discrimination claim in either the district court or the court of appeals. The court of appeals, moreover, correctly concluded that petitioner had not demonstrated any adverse employment action, let alone made out a discrimination claim of any variety (disparate impact or otherwise). Petitioner did not merely fail to identify any "practice" producing a disparate impact. Petitioner also failed to produce any evidence to support the *sine qua non* of any private ADEA claim —proof that he was treated differently on account of his age. Because resolution of the question on which petitioner seeks review would not alter the judgment below, further review is unwarranted.

1. In an earlier decision, *Adams* v. *Florida Power Corp.*, 255 F.3d 1322, 1326 (2001), cert. dismissed, 535 U.S. 228 (2002),[2] the Eleventh Circuit concluded that the ADEA does not provide for disparate impact claims. The court of appeals in that case explained that the pertinent language of the ADEA is most closely related to that of the Equal Pay Act of 1963, *id.* at 1325,

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[2] This Court granted the petition for a writ of certiorari and heard oral argument in *Adams*, 534 U.S. 1054 (2001), but dismissed the writ as improvidently granted, 535 U.S. 228 (2002).

which this Court has interpreted as precluding disparate impact claims, see *ibid.* Furthermore, although this Court has explicitly left open whether disparate impact claims can be brought under the ADEA, in *Adams* the court of appeals read *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), as suggesting that such claims cannot be brought under the ADEA. See 255 F.3d at 1326. In *Hazen Paper*, the Court noted that "[d]isparate *treatment* * * * captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610 (emphasis added). In a concurrence, three Justices agreed that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618 (Kennedy, J., concurring).

While some circuits continue to allow disparate impact claims under the ADEA, the trend since *Hazen Paper* has been away from allowing such claims. Relying on *Hazen Paper*, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have all concluded that disparate impact claims cannot be brought under the ADEA.[3] Second and Ninth Circuit decisions have reached the opposite result, but based "on pre-*Hazen* precedent." *Hyman* v. *First Union Corp.*, 980 F. Supp.

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[3] *Mullin* v. *Raytheon Co.*, 164 F.3d 696, 700-701 (1st Cir.) (not allowing disparate impact claim under ADEA), cert. denied, 528 U.S. 811 (1999); *Ellis* v. *United Airlines, Inc.*, 73 F.3d 999, 1006-1007 (10th Cir.) (same), cert. denied, 517 U.S. 1245 (1996); *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.) (same), cert. denied, 516 U.S. 916 (1995); *Lyon* v. *Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (same); *EEOC* v. *Francis W. Parker Sch.*, 41 F.3d 1073, 1076-1077 (7th Cir. 1994) (same), cert. denied, 515 U.S. 1142 (1995); *Adams* v. *Florida Power Corp.*, 255 F.3d at 1326.

38 (D.D.C. 1997).[4] And the Eighth Circuit has questioned its pre-*Hazen* determination that the ADEA allows disparate impact claims. See *Allen* v. *Entergy Corp.*, 193 F.3d 1010, 1015 n.5 (8th Cir. 1999).

2. Notwithstanding the divergence of court of appeals authority, this case does not come close to presenting an appropriate vehicle for addressing whether disparate impact claims may be brought under the ADEA. There are at least three features of this case that make further review inappropriate.[5]

a. First, petitioner did not properly raise his ADEA claim through administrative review or in the courts below. The ADEA creates "two alternative routes for pursuing a claim of age discrimination." *Stevens* v. *Department of Treasury*, 500 U.S. 1, 5 (1991). "An individual may invoke the [Equal Employment Opportunity Commission's (EEOC's)] administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies." *Stevens*, 500 U.S. at 5 (citing 29 U.S.C. 633a(b) and (c)). Alternatively, a claimant may bring an age claim in federal court directly if the claimant has notified the

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[4] See *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000) (allowing disparate impact claim under ADEA), cert. denied, 532 U.S. 914 (2001); *Lewis* v. *Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997) (same), cert. denied, 523 U.S. 1062 (1998); *Criley* v. *Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam) (same).

[5] In addition, the division in circuit authority appears to focus on the provisions of the ADEA governing non-federal employment, 29 U.S.C. 623 *et seq.*, not the distinct provisions addressing age discrimination in federal employment at issue here, see 29 U.S.C. 633a. Accordingly, this case might not present a suitable vehicle for addressing the statutory language that was previously at issue in *Adams* (a case involving a non-federal employer) and that has resulted in a split in circuit authority.

EEOC within 180 days of the unlawful action. 29 U.S.C. 633a(d); *Stevens*, 500 U.S. at 6-7.

Here, petitioner followed neither route. Although petitioner filed a formal administrative complaint with the EEOC raising his claims of race discrimination and retaliation, he did not raise an age discrimination claim. Pet. Ex. 4, at 4; Plaintiff's Additional Amendment and Clarification of Complaint, Ex. 12 (Aug. 17, 2000) (Dist. Ct. Docket Entry No. 50) (attaching copy of formal EEO complaint). In fact, petitioner did not once use the term "age discrimination," or anything close to it, in the administrative complaint. Cf. *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (issue raised when lower court was "fairly put on notice as to the substance of the issue") (citing *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 174-175 (1988)). And while petitioner initially attempted to raise an age claim directly in federal court by mentioning the ADEA in his complaint, he did not notify the EEOC of that claim within 180 days of the unlawful action. See *Stevens*, 500 U.S. at 6-7. Petitioner's failure to avail himself of any of the statutorily required procedures forecloses his claim.

Petitioner, moreover, did not press his age discrimination claim either in his district court summary judgment papers or on appeal. In fact, the only reference to age discrimination in petitioner's court of appeals briefs appears in petitioner's reply brief. There, petitioner cited an age discrimination case to support his argument that he was entitled to additional discovery to pursue his race discrimination claim. See Pet. C.A. Reply Br. 14 ("So simple a request [for limited discovery] is no bar to provision of such data in an Age discrimination case as we have cited above Dilla v. West[,] 4 F. Sup[p]. 2d 1130."). That statement does not sufficiently raise an age discrimination claim, much less a

disparate impact age discrimination claim. But even if it did, issues raised for the first time in reply are generally waived. See *United States* v. *Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (declining to address issue raised for first time in reply brief); *United States* v. *Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984) ("Arguments raised for the first time in a reply brief are not properly before the reviewing court.") (citation omitted). Therefore, even if one were to overlook petitioner's defaults before the EEOC and the district court, petitioner forfeited the claim before the court of appeals as well.

b. Notwithstanding those omissions, the court of appeals' unpublished decision mentioned (and dismissed) petitioners' age discrimination disparate impact claim in passing in a two-sentence footnote. Pet. App. 6a n.3. The court first stated that the "disparate impact claim is cognizable only under Title VII," citing *Adams* v. *Florida Power Corp.*, *supra*. The court of appeals then stated that petitioners' "disparate impact claim" under Title VII "fails because [petitioner] identifies no specific practice that resulted in no African-Americans being hired as aerospace engineers." Pet. App. 6a n.3.

For the same reason, petitioner's disparate impact claim under the ADEA must fail, even assuming such claims can be asserted. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court recognized the possibility of disparate impact claims in Title VII cases. Under a disparate impact theory, "facially neutral employment *practices* that have significant adverse effects on protected" groups may "violate the Act without proof that the employer adopted those practices with a discriminatory intent." *Watson* v. *Fort Worth Bank & Trust*, 487

U.S. 977, 986-987 (1988) (emphasis added).[6] Consequently, a plaintiff asserting such a claim must identify the specific employment practice that he is challenging. See *id.* at 994 (plurality opinion) ("[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). In addition, the plaintiff must prove causation, *i.e.*, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Ibid.* These statistical disparities must be "sufficiently substantial." See *id.* at 995 (plurality opinion). Only once those showings are made must the employer show that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k).

Here, petitioner failed to establish a prima facie disparate impact claim. Petitioner can point to no "employment practice" that has had the effect of discriminating against people on the basis of age. Cf. Pet. App. 6a n.3 ("Watts identifies no specific *practice* that resulted in no African-Americans being hired as aerospace engineers.") (emphasis added). Nor has petitioner provided any relevant statistical evidence. To the contrary, petitioner's claim consisted of a single instance in which he claimed to have received the wrong application for employment. See Pet. App. 2a. But "[t]he evidence in these 'disparate impact' cases usually

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[6] Although *Griggs* and its progeny yielded a three-part test for Title VII disparate impact claims, *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982), Congress established a statutory standard in 1991. See 42 U.S.C. 2000e-2(k).

focuses on statistical disparities, *rather than specific incidents*, and on competing explanations for those disparities." *Watson*, 487 U.S. at 987 (emphasis added).

c. Finally, and most fundamentally, the court of appeals' decision squarely forecloses petitioner's disparate impact claim—or any other sort of discrimination claim —by holding that petitioner failed to demonstrate that *he* was treated differently or otherwise injured as a result of intentional discrimination or a practice with discriminatory impact. In particular, the court of appeals found that petitioner had not established "a prima facie case of discrimination or retaliation," because petitioner "raised no genuine issue of material fact" regarding differential treatment. Pet. App. 4a. Thus, while petitioner claims that the agency failed to provide him with a non-pilot aerospace engineer application on request, there was "no evidence that someone else was provided a non-pilot engineer application when [petitioner] was denied one." *Ibid.* The bottom line is that petitioner was not given an application for that position because no such position then existed.[7] Nor was petitioner treated differently when the agency failed to send petitioner such an application *sua sponte* once a non-pilot aeronautical engineering position did become available. Petitioner "proffered no evidence that a similarly situated person outside the protected class received an application without asking for one." *Ibid.*

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[7] Petitioner's apparent belief that such a position did exist arises from the fact that a private company reproduced the original announcement of an available position with an error in the educational requirements. See Pet. App. Ex. 10, at 2. That was quickly corrected by the Army, and the announcement was reissued with an extension "to ensure that all candidates had the opportunity to see the correction." *Ibid.*

That conclusion—that petitioner produced no evidence that he was treated differently or otherwise injured on account of his age—independently supports the judgment below, whether or not the ADEA permits disparate impact claims. A plaintiff cannot bring a discrimination claim under the ADEA unless the *plaintiff himself* was somehow treated differently than others (or differently than he otherwise would have been treated) by reason of age. See 29 U.S.C. 626(c)(1), 633a(c) (claimant must be "aggrieved"). Because the court of appeals and district court both found such proof absent in this case, the court of appeals' judgment affirming the grant of summary judgment must stand, whether or not disparate impact claims are cognizable under the ADEA. Where, as here, resolution of the question presented could not alter the judgment below, further review is inappropriate. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and the Court does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it, *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990).[8]

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[8] Petitioner does allege that the court of appeals erred in concluding that he had failed to make out a prima facie case of discrimination. See Pet. 15-26. The court of appeals' fact-bound ruling on that issue, however, does not warrant further review. Furthermore, petitioner (in essence) asserts that he was entitled to avoid summary judgment without any proof of discrimination and despite the government's proof of consistent rather than discriminatory conduct. No principle of law entitles petitioner to that result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003